United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6050

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P/S

U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ARTHUR N. ECONOMOU, et al.,

Plaintiffs

-against-

UNITED STATES DEPARTMENT OF
AGRICULTURE, et al.,

Defendants

----------X

REPLY BRIEF

No. 75-6050

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARTHUR N. ECONOMOU, et al., :

Plaintiffs-Appellants: AFFIDAVIT OF SERVICE

-against- : Docket No. 75-6050

UNITED STATES DEPARTMENT OF AGRICULTURE, et al., :

Defendants-Appellees :

----------X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

TERRY WANG, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age, and resides at 235 West 102nd Street, New York, New York.

On October 9, 1975, deponent served the within Reply Brief upon Mel P. Barkan, Esq., Assistant United States Attorney of Counsel, attorney for defendant-appellees, United States Attorney for the Southern District of New York, One Saint Andrews Plaza, New York, New York 10007, the addresses designated by said attorneys for that purpose, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney for Appellees therein.

Sworn to before me this
9th day of October, 1975

DAVID C. BUXBAUM
NOTARY PUBLIC, State of New York
No. 41-0648
Qualified in Kings County
Commission Expires March 30, 1977

Terry Wang

Terry Wang

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PLAINTIFFS-APPELLANTS REPLY BRIEF

Docket No. 75-6050

I. STATEMENT OF THE CASE

This brief is filed by the plaintiffs-appellants (hereinafter "appellants") in reply to the brief of the defendants-appellees (hereinafter "appellees"), in this appeal from the order of the United States District Court for the Southern District of New York, dated May 22, 1975 dismissing this action on motion by the defendant-appellees. This action was dismissed prior to any hearing and merely on the face of the complaint, which the district court held was insufficient on its face, in that all the defendants were immune from suit under the doctrines of official or governmental immunity.

II. ARGUMENT

1. Appellees' Characterization of the Facts

The appellees' brief is a reiteration of the arguments advanced in the Court below. The appellees incorrectly described the factual situation and then incorrectly characterized the factual allegations of the complaint as being limited to three allegations namely (appellees' brief page 9), lack of notice, issuance of inaccurate press releases and subjecting the appellants to administrative proceedings in spite of their leaving the jurisdiction of Commodity Exchange Authority (hereinafter "CEA"). The appellees omit all or a part of the following factual assertions and allegations:

a) "4. Defendants... did conspire to interfere with and violate, and did interfere and violate, plaintiffs' right and privileges a[illegible] they deprived plaintiff of his property without due process of law...."

b) "5. Defendants... had confirmed that ANE, Inc.,... was in conformity with all legal requirements."

c) "6. Plaintiffs... were sharply critical of the staff and operations of the defendants and carried on a vociferous campaign for the reform of the defendants...."
"18. By the aforesaid... illegal activities,... the defendants... chilled the campaign of criticism by plaintiffs... directed against them and thereby deprived the plaintiffs of their right of free expression guaranteed by the First Amendment."

d) "7. Defendants furnished the complaints to interested persons and others without furnishing plaintiffs' ...answers... and the New York office of the defendant failed to include such answers and other records in its file made available to the public."
"8. ...Defendants issued a deceptive press release that falsely indicated... that plaintiffs'... financial resources had deteriorated, when defendants knew that their statement was untrue and so acknowledged...."

e) "13. By bringing unauthorized proceedings...without notice or warning as required by law, defendants violated the rights and privileges of the plaintiffs... including their rights to due process of law".

f) "15. By bringing unauthorized proceedings... when plaintiffs were no longer subject to their jurisdiction, defendants, in excess of their discretionary powers, violated the rights and privileges of the plaintiffs...."

g) "16. ...defendants sought to supress legitimate business activities of the plaintiffs... that Congress did not give them authority to regulate, punish the plaintiffs... ruin their business reputation, through harassing them..." etc.

h) "17. ...defendants, in excess of their regulatory authority ... and powers, did issue administrative orders, illegal and punitive in nature, /when/ plaintiffs...were no longer subject to their authority...."

i) "20. By issuing a deceptive press release...that falsely indicated the plaintiffs' financial resources had deteriorated when the defendants knew... they did not, defendants violated plaintiffs' right (s) and had a serious effect upon the plaintiffs!.. business...."

j) "21. Those defendants who were law enforcement and investigative officers... did act outside the scope of their authority and abuse legal process".

k) "25. Defendants did in excess of their authority trespass on plaintiffs' property."

2. Appellees' Characterization of Procedural History

The appellees' characterization of procedural history is full of errors. For example:

"Prompted only by the threat that Judge MacMahon would dismiss the case for lack of prosecution, three days later plaintiffs filed a motion for leave to file a second amended complaint". (Appellees brief, page 7).

In fact, to the knowledge of appellant's attorneys, word had commenced on the amended complaint prior to Judge MacMahon's inquiry about the status of the case, the appellants herein have served interrogatories upon the defendants, which defendant-appellees had not bothered to answer, despite the passage of the statutory time, which passed prior to Judge MacMahon's decision dismissing this case.

3. The Opinion Below

The appellees state:

"... the District Court (as required by a Rule 12(b)motion) presumed the facts as alleged to be true. The complaint was dismissed on the ground that even if Economou proved everything he alleged, he must lose since prior case law precluded him from recovering for the three specific wrongs he alleged in his complaint." (Appellees' brief, page 10).

As noted in the appellants original brief, the decision by Judge MacMahon did not deal with a number of the plaintiffs allegations. The opinion certainly does not speak as if it is assumed that all the matters alleged by the plaintiffs were presumed to be true. Certainly no one has immunity to act outside his authority and deprive the plaintiffs of their property without due process of law or to chill the speech of the plaintiffs in violation of First Amendment rights. Yet, we have to assume that the appellees, and the Court below, claimed that immunity of this type existed for federal officials.

Similarly, no one has immunity to maliciously harass individuals, deprive them of their property, and knowingly issuing false statements about their financial position to their detriment. Yet, appellees' brief would seem to assert that the decision below held that immunity as broad as this should be granted by the Court.

Obviously, no such immunity exists; in fact, even the cases cited by the appellees support the position that there must first be a factual determination of the activities engaged in by the individual defendants and they must be weighed against the responsibility they have, in order to determine what immunity, if any, exists. This matter shall be discussed in greater detail hereinbelow.

a) The Appellees' Laches.

Neither the appellees' brief nor the decision of the Court below deals with the fact that the appellees only made a motion to dismiss after several years had passed and when they were required to respond to interrogatories.

The same attorneys were handling this matter from the inception of this litigation for the appellees, i.e., the same personnel in the United States Attorney's office were involved. There was no doubt that the

appellees'motion was belated. The fact that the Court gave the defendant-appellees consideration at this late date is to say the least, surprising. The appellant respectfully suggests that the appellants application on appeal should be granted and this case set down for discovery and trial on the basis of appellees laches alone.

b) Need for Factual Hearing

The defendants cite the case of Biven v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972) on page 13 of their brief. The Bivens decision, by Judge Medina, dealt with Federal Bureau of Narcotics agents, the case held:

> "...that it is a principle of federal law that Agents of the Federal Bureau of Narcotics, and other federal police officers such as Agents of the FBI performing similar functions, while in the act of pursuing alleged violators of the narcotics laws or other criminal statutes, have no immunity to protect them from damage suits charging violations of constitutional rights."

Thus, the Court held there was no immunity, but if the Federal Agents acted in good faith, with reasonable belief in the validity of the arrest and search and in the way it was conducted, they have a valid defense.

It is important to note that the Court said that such defense had to be alleged and proved (at page 1341).

> The Court further held that the Supreme Court "...recognized a right of action against federal officers that is roughly analogous to the right of action against state officers that was provided when Congress enacted the Civil Rights Act." (at page 1346).

The Court quoting Carter v. Carlson, 447 F.2d 358 (1971) at 401 stated:

> "I do not think that a Federal officer not subject to section 1983 by its terms, and sued in tort at common law, should be held to enjoy an immunity denied his state or territorial brother similarly situated". (at page 1347).

In short, to have a defense, the Court held:

"Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted." (at page 1348, emphasis supplied).

Thus, the Bivens Court held that partys must allege and prove any defenses they have including such limited immunities as they may enjoy.

In the Bivens case the Court noted:

"... The Government now seems to think we should remand the case for some vague form of fact finding. We disagree. Any such unorthodox procedure would introduce a new and quite unnecessary form of pretrial and it could not fail to becloud the issues. What we now do is pass upon the sufficiency of the complaint. We find it states a claim for relief and the judgment dismissing the complaint is reversed and the case is remanded to the District Court for further proceedings not inconsistent with this opinion". (at page 1348).

Therefore, the clear holding of the Court was that the matter should proceed to trial. It is our belief that this case here should also proceed to trial.

The Bivens case which was decided before Doe v. McMillan, 412 U.S. 306 (1972) and Scheuer v. Rhodes, 416 U.S. 232 (1974), cases which appellees' brief virtually ignores, in quoting the opinion in Barr v. Matteo, stated that in short to determine Immunity:

"...one must look to the duties performed by the officer, not to his title...." (at page 1342).

A question arises as to whether the officer performs discretionary acts: "...at those levels of government when the concept of duty encompasses the sound exercise of discretionary authority". 360 U.S. at 575, 79 S. Ct. at 1341.

Naturally, the Court in Bivens held that agents are not immune since they were not performing the discretionary acts that required the protection of immunity.

The appellees also cite, Galella v. Onassis, 487 F.2d 986 (1973). Even the well known Galella case wherein secret service agents were, under the circumstances, held immune from suit, was determined after a factual hearing. The relevant factual assertions are described on page 993 of the opinion. Galella's actions, by jumping into the path of John Kennedy, forced the boy to "...swerve his bike dangerously... whereupon the agents gave chase to the photographer". The Court held it was reasonable to apprehend Galella at that time and to check his credentials at the police station. The Court noted that if the officers were acting in good faith and reasonably when making their arrest, they have an affirmative defense to their action. Galella did "... not seriously dispute the Court's findings of tortious conduct" (487 F.2d 986, 995).

There was testimony in the Galella case, and hearings were held, as the Court stated: "Descrediting all of Galella's testimony the Court found the photographer guilty of harassment...." etc. 487 F.2d 986, 994. See also footnote 10 at p. 994. There were oral depositions taken in Galella's case, (see p. 997), in fact, Galella was expelled from one of the depositions. The trial was consolidated with preliminary injunction proceedings after discovery. In the case at bar there has been no factual hearing and in fact, the defendants never responded to the interrogatories of the plaintiff.

The defendants do not cite any precedent, wherein an assertation of immunity can be granted prior to a factual hearing. Nor does the opinion below ever came to grips with this issue. Certainly, in the case at bar, where issues of infringment of Consitutional rights are asserted, where assertions are made that individuals acted outside the scope of their employment, where bad faith and malicious intent are charged, where seriously tortious conduct is alleged, there must be a factual hearing and only at trial

can the defenses of immunity be raised and proved.

Since the defendants have refused to permit discovery, there is no way to determine whether or not there is immunity. There has yet to be a factual determination of which defendants performed what acts in this case, thus the entire assertion of immunity is absurd.

The appellees disregard the most recent Supreme Court rulings in this field, merely citing Doe v. McMillan, 412 U.S. 306 (1972) in a note on page 14 of appellees' brief and Scheuer v. Rhodes, 416 U.S. 232 (1974) on the same page in a single paragraph. The appellees' attempt to dismiss the Doe case as inapplicable since it involves legislative immunity and the Scheuer case as inapplicable since it involves the Ohio National Guard, seems to be without merit, as these two cases deal with the entire question of immunity in some detail, as noted in the original brief of the appellant. The Doe case, which does deal with legislative immunity, would seem to be most significant, since one would expect that legislative immunity under the Speech and Debate clause, a Constitutional provision, would be even broader than immunity granted by Court order.

c) Scope of Immunity

The appellees' brief makes note of several cases that are of no relevance to the case at bar. For example, it cites several cases to the effect "...that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General". (Appellees' brief, notes, p. 17). The long list of cases cited are not at all relevant to the case at bar. For example, Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (1973), involved a suit by inmates of Attica in an attempt to require the prosecutor to arrest and prosecute state officers and officials. This Court held that the prosecutor has discretion as to whom to prosecute and no writ of mandamus would issue to require an impartial hearing

or an investigation.

The situation at bar is quite different and the prosecutor does not have immunity from wrongful acts. It has been held as recently as August 27, 1975, by Judge Mishler in the United States District Court for the Eastern District of New York, that prosecutorsonly enjoy limited immunity,Fred G. Moritt v. Maurice H. Nadjari et.al. 75 C 554. The plaintiff Moritt, a Civil Court Judge, in a suit against Special State Prosecutor Nadjari and others sought $10,000,000 in compensatory damages and a like amount of punitive damages, for the surpression of certain material before the Grand Jury, disseminating false, prejudicial and inflammatory news releases and arresting the plaintiff without probable cause.

The Court's opinion is instructive:

> "The defendants argue that none of the rights which have allegedly been violated are rights guaranteed to the plaintiff by the Constitution. But at least some of the plaintiff's allegations have been recognized as sufficient under section 1983. Among these are suppression of evidence, Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972), cert. denied, 409 U.S. 1029, 93 S.Ct. 461; intentional abuse of the prosecutorial role including misuse of the Grand Jury, Haaf v. Grams, 335 F. Supp. 542 (D. Minn. 1973); possible unlawful arrest, Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1973), cert. denied, 375 U.S. 975, 84 S.Ct. 489 (1964); Rue v. Snyder, 249 F. Supp. 740 (E.D. Tenn. 1966). While not all of the allegedly violated rights are of constitutional dimensions, as for example, the allegedly prejudicial press releases, Martin v. Merola, 389 F. Supp. 323 (S.D.N.Y. 1975), nevertheless the preponderance of the charges in Count 1 do allege sufficient constitutional violations to state a claim under section 1983. The standard against which a complaint should be measured in a motion to dismiss has been stated by the Supreme Court in Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102 (1957):
>
> > 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'.
>
> Plaintiff's complaint may be inartfully pleaded and the possibility of ultimate success may be remote, but a complaint should not be dismissed for those reasons. It is not impossible, however unlikely, that plaintiff will be able to prove some set of facts which will support his claims." (Opinion p. 3 and 4).

In some sense the Moritt case is directly on point, since the standard for dismissal of a complaint is clearly spelled out. Furthermore, as noted supra this Court has held a federal official should not be held to a lesser standard of conduct than a state official Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F. 2d 1339, 1347 (2nd Cir. 1972), quoted supra p. 5.

The Moritt case also discusses official immunity from suit, at p.4 and 5.

> "The defendants also argue that the complaint cannot stand because of a lack of subject matter jurisdiction, specifically that the defendants are immune from suit because of their official positions. Prosecutors are regarded as immune from suits arising out of acts done in their official capacities, Buers v. Heisel, 361 F. 2d 581 (3d Cir. 1966), cert. denied, 386 U.S. 1021, 87 S.Ct. 1367 (1967). However, that immunity is not absolute, but only qualified, Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683 (1974). A claim of immunity will be particularly strictly interpreted in a civil rights complaint because of the remedial nature of the action. Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966). The immunity will not extend to improper acts, acts which are in effect outside the scope of the official's authority. Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970), cert. denied, 400 U.S. 846, 91 S.Ct. 93; Bauers v. Heisel, supra. If the plaintiff is able to prove the truth of the allegations of prosecutorial misconduct contained in count 1, officials such as Nadjari and Wolfe, and the other defendants charged in count 1 should not be permitted to escape responsibility for their misconduct by hiding the shield of immunity."

The Moritt case is in keeping with the recent trend in the law, to narrow the scope of immunity. While judicial officials and secret service men making a reasonable and lawful arrest, have a defense, even FBI agents have been held liable for suit where they act in a negligent fashion. Downs et. al., v. U.S.A. (6th circ), No. 74-1660, decided August 8, 1975. That opinion, on p. 7, in discussing the discretionary function exception, favorably quoted a note, "Remedies against the United States and its Officials"70 Harvard Law Review 827, 896 (1957):

> "It would seem that the justifications for the (discretionary function) exception do not necessitate a broader application than those decisions which are arrived at through an administrator's exercise of quasi-legislative or quasi-judicial function."

The sixth circuit cited the Bivens Case 456 F.2d 1339, 1346 (2d. cir, 1972) with favor stating at page 9:

> "It is clear that making an arrest involves the exercise of discretion. For purposes of official immunity, however, the fiction that making an arrest is not "discretionary" is maintained because protection of personal liberties is thought to outweight the danger of less effective law enforcement out of fear of personal tort liability".
>
> "The need for compensation to citizens injured by the torts of government employees outweighs whichever slight effect various government liability might have on law enforcement efforts".

The Court, despite the fact that it was dealing with a federal matter and federal officials also cited Scheuer v. Rhodes, 416 U.S. 232 (1974). Indeed the Scheuer case has become a most significant case in analyzing immunity for suit. The Scheuer case was decided by an unanimous court, and the opinion was written by Chief Justice Burger. The Court's discussion of immunity refers to the entire ambit of immunity and touches on the historic background to the concept of immunity 416 U.S. 232, 239, 240. The Court particularly discusses the question of official immunity and public policy. The Court, noted that:

> "In this country, the development of the law of immunity for public officials has been the product of constitutional provision as well as legislative and judicial process" 416 U.S. 232, 240.

Legislative immunity was granted by Article I, Section 6 of the Constitution. The history of this provision, as the Court notes, was fear of criminal action against critical or disfavored legislators by the executive. 416 U.S. 232, 241.

The Court notes that certain policy considerations pervade the analysis as to the scope of immunity, and the Court does not differentiate

between state or federal officials. 416 U.S. 232, 241.

While the Court interpreted the statute, it stated regarding the scope of immunity:

> "Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 USC Sec. 1983."
>
> "It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute." 416 U.S. 232, 243.

The Court, noting that common law never granted police officers unqualified immunity for an unlawful arrest, went on to analyze the position of executive officers. The Court quoted favorably from Justice Harlan's opinion in Barr v. Matteo, noting that it was:

> "In a context other than a section 1983 suit".
>
> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted-the relation of the act complained of to matters committed by law to his control or supervision. Spalding v. Vilas, supra, at 498 (40 L Ed. 780) - which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." Barr v. Matteo, 360 U.S. at 573, 574, quoted in Scheuer v. Rhodes, 416 U.S. 232, 247.

Thus the Court held:

> "...a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. 416 U.S. 232, 247 and 248.

The Court further held:

> "The District Court acted before answers were filed and without any evidence other than the copies of the proclamations issued by respondent Rhodes and brief affidavits of the Adjutant General and his assistant. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that mob rule existed at Kent State University. There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed." 416 U.S. 232, 249, 250.

The cases were remanded for further proceedings.

How can the results be any different in the case at bar, where even less material was presented to the district court, than in the Scheuer case, where there were at least affidavits offered in evidence. In the district court below, there was no factual presentation at all. Judge MacMahon, during the oral argument in the motion to dismiss, stated that he would deny a motion for summary judgment since there were essential facts that were in dispute. Therefore, the appellees'assertion in their brief, that this matter could be or should be considered one for summary judgment, is not at all appropriate.

d) Discretionary Functions

Some legal writers have construed the breadth of immunity under the discretionary functions exception, rather broadly, in fact more broadly than the cases, particularly the recent cases, have supported. Nevertheless, even such writers have said:

> "When cases arise in which the plaintiff has suffered heavy accrued losses, the gravity of his injury may well override the presumption against recovery, and then, unless the officer's act is palpably ultra vires, recovery should be available from a responsible defendant,be it bonded or indemnified official or the treasury itself". L. Jaffe. "Suits Against Government Officers: Damage Actions" 77 Harv. L. Rev. 209, 223 (1963).

Of course, where the officer's acts are clearly ultra vires, then he is individually liable for his own torts. It has been customary for the federal government to supply counsel to federal officials and to reimburse them by private bills or other means when they are found to be liable for ultra vires acts.

If Prof. Jaffe's suggestions are to be considered, no clearer case of liability could be conceived than the plaintiffs in the case at bar, since the damage by the defendant's various acts was indeed substantial. For example, when a knowingly false press release is issued, relevant to a small corporation in the commodities field, suggesting that the company's financial condition is deteriorating, simply and essentially such an act virtually stops the company's business. Once such a release is issued, which the plaintiff alleges was malicious in nature and intent, and it is published in the trade papers, as it was in this case, customers of the plaintiff run from him. In addition, where the plaintiff is a known critic of the defendants, for philosophical reasons, he is clearly chilled in his speech by these acts. These are just some minor examples of the clear harm the plaintiff-appellants have suffered as a result of the defendant-appellees acts. The Doe case and other Supreme Court cases have held, that officials, even if blanketed with Constitutional immunity under the speech and debate clause, must be most careful in releasing information that would be injurious to the names and reputations of individuals and such a release must have a clear legislative function. How much more so is it necessary for the defendants in this case to use care, and clearly not to issue knowingly false press releases, merely to damage the plaintiff. Releasing such a press release is not only unprotected, but also may even be ultra vires, as Jaffe used that term.

In any event, the court, or a jury, would have to determine what scope of immunity, if any, protected these defendants, in view of their

responsibilities. That could only be undertaken after this matter has been remanded for trial. It is interesting to note, that even before the Doe case, in Barr v. Matteo, where the Director of the Office of Stabilization was granted broad immunity by a five to four decision of the Supreme Court, certain writers asserted that such an "...award should go against the government". L. Jaffe, op. cit. 77 Harv. L. Rev., 209, 239.

The decision below states, with regard to official immunity that:

> "In order to establish this defense, defendants must show that their alleged unconstitutional acts were within the outer perimeter of their authority and discretionary". (Memorandum, Opinion and Order, hereinafter "Opinion", May 22, 1975 p. 2 and 3, attached hereto as Exhibit "A").

The next paragraph of the decision below reads as follows:

> "The initiation and maintenance of disciplinary proceedings against commodity traders for violations of the Act and the issuance of press releases concerning such violations, defendants' alleged unconstitutional acts, were committed to defendants' control by section 9 and 12 of the Act. Moreover, plaintiffs admit in their second amended complaint that defendants' acts were connected to their duties under the Act. We conclude, therefore, that the individual defendants' acts were well within the scope of their authority." Opinion, Exhibit "A", p. 3.

This paragraph contains a number of mistakes of law and fact. In the first place, the plaintiffs have not admitted "... that defendants' acts were connected to their duties under the Act". For example, paragraph 11 of the complaint reads as follows:

> "11. We believe the federal courts decision clearly leads to the conclusion that the actions of defendants against ANE, Inc. and ANE were outside the discretionary functions or duties of defendants."

Paragraph 13 and 14 of the complaint alleges "unauthorized proceedings" and paragraph 15 alleges "unauthorized actions" by the defendants which Congress did not grant authority to regulate, in an attempt to ruin the business reputation of the plaintiff. Paragraph 17 of the complaint alleges the defendants "in excess of their regulatory authority and

discretionary functions and powers did issue administrative orders, illegal and punitive in nature, against the plaintiffs...." Paragraph 21 of the complaint alleges that defendants "...did act outside the scope of their authority", as does paragraph 22 of the complaint. How can these allegations sustain the opinion below that the plaintiffs admitted that the "...defendants' acts were connected to their duties under the Act". The plaintiffs in the second amended complaint admit no such thing and the decision is clearly wrong and should be reversed on these grounds alone.

Thereafter, the Opinion below goes on to state, that:

> "Once the defendants have established that their acts were authorized, they can qualify for official immunity by showing the acts involved the exercise of discretion". Opinion p. 3, Exhibit "A", emphasis supplied.

The Opinion below makes a leap in logic from the assertion that the "defendants acts were connected with their duties under the act" in the second paragraph on page 3, to the assertion that "...their acts were authorized...." There has been no showing that the defendants acts were authorized and the Opinion itself merely jumps from one point to another, without any logical reason. Since there is no showing that the acts were authorized, the Opinion below is in error and clearly should be reversed.

Thereafter, as quoted above, the Opinion below indicates that a showing by the defendants that "the acts involved the exercise of discretion", would suffice to qualify for official immunity. The Opinion footnotes Barr v. Matteo to substantiate this, failing to recognize that even Barr v. Matteo does not hold that the mere exercise of discretion suffices to grant an official immunity from suit. In fact, the courts have held that the mere exercise of discretion does not entitle an official to immunity from suit as we have shown supra. Thus the Opinion below is again in error and it is respectfully suggested, should be reversed.

Finally, the Opinion below attempts to analyze the facts in relationship to the law, as it has described the law. The opinion states:

> "The undisputed facts are that the Secretary of Agriculture, after examining a Commodity Exchange Authority audit of ANE, Inc., exercised his judgment and concluded that plaintiffs had wilfully violated the Act. He, therefore, took immediate action against plaintiffs without first issuing a warning letter." Opinion p. 4, Exhibit "A".

In fact, there are no undisputed facts in this case, there is only a summons and complaint. Even the defendants have not asserted that the Secretary of Agriculture exercised a judgment. We do not know who exercised a judgment, if anyone. Only after a hearing on the facts, can we determine who if anyone exercised a judgment. Certainly, all the defendants in this case did not undertake discretionary activity, let alone such discretionary activity that would grant them immunity to suit. The decision below is clearly in error and should be reversed.

e) Miscellaneous Legal Points

The appellees' brief treats certain questions, that while in the opinion of the appellant, not quite relevant, should be mentioned. The appellees state that a determination of wilful behavior is a discretionary act, and one that the CEA had the authority to undertake. (Appellees' Brief p. 16 and 17). The statute and rule, quoted in part on p. 17 and 18 of the appellees' brief states that prior to taking action against a person, such person shall be informed in writing and "... shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements." Only if acts are wilful, or the public health, safety or interest require, can this notice be dispensed with. This court has held in 494 F.2d 519 (1974) that it was "...conceded /the customary warning letter/ might well have resulted in prompt correction of the claimed insufficiencies." Therefore, even if we presume good faith, by admission of the defendants, the warning letter should

have been sent and there was no, absolutely no evidence, of wilfulness. Failure to send the warning letter, if good faith is presumed, resulted in public action against the plaintiff-appellants that very seriously damaged their reputations and their business. Coupled with various other facts, the plaintiff-appellants believe the failure to send the warning letter was not mere gross negligence, but a deliberate attempt, a quite successful one, to damage the reputation and business of the plaintiffs. Surely this is a matter for serious legal action.

The appellees' brief also deals in part with the question of whether there was authority to suspend the plaintiffs after they had left the jurisdiction of the defendant CEA. The facts are, the plaintiffs were no longer engaged in any activity regulated by the CEA, were out of the business and thereafter the defendants announced to the world that they were suspended from the business-not punished or fined for prior acts, but suspended from a business they were not engaged in. Even assuming the original acts of the plaintiffs were wrongful, and the decision of this court makes that rather doubtful, a suspension of someone with no standing or position is a gratuity the law does not permit. Again, the appellant alleges this action coupled with a public release of said suspension was a deliberate attempt to damage his name, injure his business, take his property and chill his speech.

We have shown that issuance of press releases are not automatically privileged acts. The Doe case and others make that clear. And even if issuance of said release was privileged, is the drafter of the release operating outside the scope of his employment and or maliciously attempting to injure the plaintiff, automatically immune from suit? We think not.

The appellees' brief and the decision below allege that the CEA and the United States Department of Agriculture are not suable entities. In

fact, of course, they are suable entities or the United States of America is a suable entity under the Federal Tort Claims Act. The appellants recognize that in order to sue the government under the Federal Torts Claims Act, a necessary condition is the presentation of a claim before what would be the Department of Agriculture in this case. Since it is clear that the Department of Agriculture, rejects the claim of the plaintiff-appellants such an application would be a useless act and therefore, the plaintiff-appellants request that the administrative application be waived as futile and that the United States government be regarded as a rightful party-defendant to this action. Obviously, this claim against the Government, has nothing to do with the claims of the plaintiff against individual defendants named in this action.

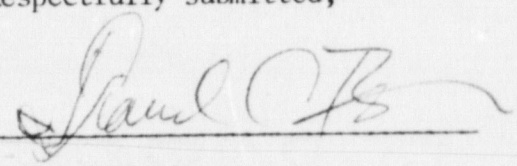
III. CONCLUSION

It is respectfully alleged by the appellants in this case, that the decision of the district court was clearly in error. This case must be remanded for trial. The holding of the courts is virtually unanimous, official immunity, where it exists, must be alleged and proved at trial. As a unanimous Supreme Court has stated "...an executive officer may or may not be subject to liability depending on all the circumstances that may be revealed in evidence". Scheuer v. Rhodes 416 U.S. 232, 239 (1974). As we have previously noted final resolution of this question "... must take into account the functions and responsibilities of these particular defendants...." 416 U.S. 232, 243. The opinion below has not come to grips with this basic factor relating to the question of immunity of government officials.

For the aforesaid reasons, it is respectfully requested that the decision and Order of the District Court of May 22, 1975, be set aside and that this matter be remanded for discovery and trial.

Dated: New York, New York
October 7, 1975

Respectfully submitted,



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ARTHUR N. ECONOMOU et al.,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF AGRICULTURE et al.,

Defendants.

----------x

72 Civ. 478 LFM

MEMORANDUM

#42465

MAY 22 1 53 PM '73
S.D. OF N.Y.

MacMAHON, District Judge.

Defendants move, pursuant to Rule 12(b), Fed. R.Civ.P., to dismiss the second amended complaint on the ground that it is barred as to the governmental agencies by the doctrine of sovereign immunity and as to the individual governmental employees by the doctrine of official immunity.

At first blush, plaintiffs' lengthy second amended complaint appears to allege ten "causes of action." Upon close examination of the second amended

(A)

complaint, however, we conclude that it only makes three claims that defendants deprived plaintiffs Arthur N. Economou (ANE) and Arthur N. Economou & Co., Inc. (ANE, Inc.)[1] of their constitutional rights: (1) defendants' decision to initiate disciplinary proceedings against plaintiffs under § 9 of the Commodity Exchange Act (Act) without first issuing a warning letter; (2) defendants' decision to continue disciplinary proceedings against plaintiffs even though they were no longer in business as futures commission merchants under the Act; and (3) defendants' issuance of inaccurate press releases concerning plaintiffs.

The defendants, the United States Department of Agriculture and the Commodity Exchange Authority, as agencies of the United States, can invoke the doctrine of sovereign immunity as a bar to suit unless congress has authorized them to be used in their own name.[2] Since it is undisputed that congress has not authorized either agency to be sued, we dismiss the complaint as to them.

The individual defendants, all officials of the United States Department of Agriculture or the Commodity Exchange Authority, contend that they are protected from suit by the doctrine of official immunity. In order to establish this defense, defendants must show

that their alleged unconstitutional acts were within the outer perimeter of their authority and discretionary.[3]

Defendants can establish that their acts were within the outer perimeter of their authority if they can show that the acts had more or less connection with the general matters committed by law to their control or supervision.[4]

The initiation and maintenance of disciplinary proceedings against commodity traders for violations of the Act and the issuance of press releases concerning such violations, defendants' alleged unconstitutional acts, were committed to defendants' control by §§ 9 and 12 of the Act. Moreover, plaintiffs admit in their second amended complaint that defendants' acts were connected to their duties under the Act. We conclude, therefore, that the individual defendants' acts were well within the scope of their authority.

Once defendants have established that their acts were authorized, they can qualify for official immunity by showing that the acts involved the exercise of discretion.[5] Authorized acts of discretion by governmental officials are immunized from suit so that such

officials can make decisions while performing their duties "without fear or threat of vexatious or fictitious suits or personal liability."[6]

We turn to an examination of each act of defendants alleged to be unconstitutional in light of these principles of law to determine if the act was discretionary and, therefore, warrants immunity.

Plaintiffs contend that defendants' decision to initiate disciplinary proceedings against them for violations of the Act without first issuing a warning letter was an unconstitutional ministerial act not entitled to immunity.

The undisputed facts are that the Secretary of Agriculture, after examining a Commodity Exchange Authority audit of ANE, Inc., exercised his judgment and concluded that plaintiffs had wilfully violated the Act. He, therefore, took immediate action against plaintiffs without first issuing a warning letter.

The Secretary, in deciding whether to initiate proceedings against plaintiffs, was in a position analogous to that of a prosecutor in deciding whether

to bring criminal proceedings against a defendant. Courts have uniformly held that the decision whether to prosecute a defendant is discretionary because it involves the evaluation of evidence and the exercise of judgment.[7] Since the Secretary evaluated the evidence against plaintiffs and exercised his judgment prior to proceeding against them, there can be no doubt that his decision was discretionary and entitled to immunity.[8]

Plaintiffs next contend that defendants' decision to continue disciplinary proceedings against them after they had withdrawn from doing business as futures commission merchants under the Act was a ministerial act which deprived plaintiffs of their constitutional rights. Defendants contend that they interpreted the Act to require them to complete proceedings against plaintiffs in order to prevent them from obtaining a new license in the future.

In an analogous situation, it has been held that, even though a securities broker-dealer had withdrawn from doing business under the securities laws, the SEC's decision to bring public proceedings against it was a discretionary act involving the SEC's interpretation of the securities laws which it was charged with enforcing and would not be upset by the court.[9]

Since defendants' decision to continue with the proceedings involved discretionary interpretation of the Act which they were charged with enforcing, the decision is entitled to immunity.

The third act by defendants which plaintiffs claim is ministerial is the issuance of several press releases allegedly containing false and misleading information about plaintiffs while defendants were proceeding against them under the Act. The issuance of press releases by governmental officials concerning administrative enforcement proceedings is a discretionary act entitled to immunity.[10]

Since the individual defendants have shown that their alleged unconstitutional acts were both within the scope of their authority and discretionary, we dismiss the second amended complaint as to them.

Accordingly, we grant defendants' motion, pursuant to Rule 12(b), Fed.R.Civ.P., to dismiss the second amended complaint as to all defendants. SO ORDERED.

Dated: New York, N. Y.
May 22, 1975

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

FOOTNOTES

1 In the second amended complaint, American Board of Trade, Inc. (AMT, Inc.) appears as a plaintiff. The only reference to this plaintiff is in paragraphs 25 and 26 of the second amended complaint, wherein it is alleged that defendants' acts vis-a-vis plaintiffs ANE and ANE, Inc. caused AMT, Inc. emotional burdens and resulted in trespass on its land. These vague and conclusory allegations completely fail to establish a causal link between defendants' acts and the alleged harm to AMT, Inc. We, therefore, grant defendants' Rule 12(b) motion as to AMT, Inc. and reference to "plaintiffs" in the text will mean ANE and ANE, Inc. only.

2 Blackmar v. Guerre, 342 U.S. 512 (1952).

3 Barr v. Matteo, 360 U.S. 564 (1959).

4 Spalding v. Vilas, 161 U.S. 483 (1896). See also Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).

5 Barr v. Matteo, supra.

6 Ove Gustavsson Contracting Co. v. Floete, 299 F.2d 655, 659 (2d Cir. 1962), cert. denied, 374 U.S. 827 (1963).

7 Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

8 The court, in Economou v. U.S. Dep't of Agriculture, 494 F.2d 519 (2d Cir. 1974), held that the Secretary of Agriculture should have issued a warning letter to plaintiffs ANE and ANE, Inc. before filing a complaint against them because his conclusion that plaintiffs had wilfully violated the Act was not warranted from the record as a whole. We have held that the Secretary's decision not to issue a warning letter was within the scope of his authority and discretionary. As such, it is still entitled to immunity even though it has been held to be incorrect. Boruski v. Stewart, 381 F. Supp. 529 (S.D.N.Y. 1974).

9 M.G. Davis & Co. v. Cohen, 369 F.2d 360 (2d Cir. 1966).

10 Barr v. Matteo, supra; Federal Trade Comm'n v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968).